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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GARLAND BRADSHAW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-18a) is reported at 490 F. 2d 1097.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 19a) was entered on January 9, 1974. A

timely petition for rehearing was denied on April 1, 1974 (App. C, *infra*, pp. 20a-21a). On April 30, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to May 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the application of the "plain view" exception to the warrant requirement necessarily depends upon visual observation, or whether it may be founded on other sensory perceptions.

2. Whether the entry into the back of a truck by an officer who viewed and smelled non-taxpaid liquor in that area is the kind of invasion of reasonable expectations of privacy that must be done pursuant to a warrant in order to be held reasonable.

3. Whether police officers, lawfully on respondent's premises, having probable cause to believe that a vehicle contains contraband, could properly conduct a warrantless search of the vehicle.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Western District of North Carolina, respondent was convicted of one count of possessing non-taxpaid whiskey, in violation of 26 U.S.C. 5205 (a) and 5604(a). He was sentenced to three years' imprisonment. On appeal, the court of appeals reversed on the ground that respondent's truck, in which the contraband was found, had been subjected to an unreasonable search and seizure.

The evidence showed that on the afternoon of November 16, 1972, Special Agent Williams of the Alcohol, Tobacco and Firearms Division of the Treasury Department, in the company of two local A.B.C. officers, Devinney and Hennesy, drove to the vicinity of respondent's home in the Dirty Ankle section of Cleveland County, North Carolina (Tr. 4). Agent Williams had known respondent for approximately 15 years and knew his reputation for dealing in non-taxpaid liquor (Tr. 27). Intending to conduct a search of "the area for an illegal distillery or illegal whiskey" (Tr. 4-5, 79), Agent Williams and Officer Devinney got out of their car at the foot of the roadway leading to respondent's house, approximately a quarter of a mile distant.

Upon entering the woods, the officers came upon an old, apparently abandoned, car just by the side of the road about 300 or 400 yards below the respondent's

house (Tr. 5). A "strong odor of whiskey" emanated from the car (Tr. 20). The officers continued on, looking for an illegal distillery (Tr. 78). When that search proved unavailing, the officers decided to leave the area temporarily, intending to return and "set * * * up an observation * * *, believing there was whiskey in the old abandoned vehicle" (Tr. 20). They radioed Hennesy and returned to their starting point on the paved road (Tr. 6).

Agent Williams later testified that just "as we started out to the paved road, the defendant Bradshaw drove into his driveway, and we were there in plain sight of him as he drove in. * * * [W]e tried to hide and I wasn't able to get out of his sight" (Tr. 6, 22). Almost immediately, Officer Hennesy drove up (Tr. 7). Agent Williams then told his companions, " '[w]e had better go back and check the old car because if there is any whiskey in it it will be removed' " (Tr. 31). They drove up to the abandoned car, "stopped for just a second, and Mr. Hennesy said 'Do you think we should say something to Garland about this vehicle before we go into the back seat and tear the back seat out?' " (Tr. 58).

The officers then drove on to respondent's house. Williams went up onto the porch and knocked on the door, but received no answer (Tr. 8). Just then a black Ford pickup drove into the yard, occupied by two persons known to Agent Williams (Tr. 8). Williams walked over to the truck and observed 25 or 30 bags of * * * bran (Tr. 8), which he knew is used in the manufacture of whiskey (Tr. 33). The

Ford left after Williams conversed briefly with the occupants, and Williams knocked again at the front door and called out respondent's name, without success (Tr. 9).

Williams testified, "I left the front porch and started to walk around to the back of the house * * * and I observed this truck that was sitting beside of the house" (Tr. 9). As Williams described the truck, "it was a 1952 Ford truck. It had a ton, ton and half, pretty good size vehicle. It had sideboards on the sides of it, and swinging doors on the rear" (Tr. 10). As Williams described his actions (Tr. 10-11):

> As I walked by the back of this vehicle * * * I could smell a very strong odor of whiskey, had the odor of moonshine whiskey. * * * At this point I stopped at the rear of the truck * * * I looked through kind of a crack in the back swinging doors * * * of the truck * * * and I observed a large quantity of one gallon plastic jugs * * * that were seated on the truck bed, not in cases. They were just sitting there on the bed of the trunk in the open. There was a white liquid. I observed a white liquid in the jugs. At that time I opened the swinging doors of the truck.

Williams called to Officer Devinney, " 'Here, look what is in the truck' " (Tr. 79). He then took one of the jugs, opened it, and tasted and smelled the contents, confirming that "it was illegal distilled spirits" (Tr. 40). There were 144 one gallon jugs of whiskey on the back of the trunk; none had tax stamps affixed (Tr. 40).

The officers then seized the truck and destroyed all of the whiskey and containers, except two jugs kept as evidence (Tr. 41).[1] Respondent was not found at that time, but on January 18, 1973, after a warrant was issued for his arrest, respondent surrendered himself (Tr. 42).

The district court denied a motion to suppress the contraband and admitted it as evidence at trial (Tr. 27). The court of appeals reversed, with one judge dissenting. The court of appeals held that Agent Williams' smelling of the moonshine did not amount to a plain view justifying a warrantless seizure (App. A, *infra*, p. 7a) and that the search was not within the "automobile exception" to the warrant requirement because "two of the agents could have guarded the truck smelling of moonshine whiskey while the third obtained a warrant without significant risk of loss of evidence * * *"(App. A, *infra*, p. 14a). The dissenting judge would have upheld the search "on the ground that the evidence was lawfully seized under the plain view exception" (*id.* at 15a). He further stated that holding the search of the truck unlawful while recognizing that its seizure while a warrant was obtained would have been permissible "is construing the Fourth Amendment with critical niceness to which I may not accede" (*id.* at 18a).

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[1] The officers also searched the abandoned vehicle they had originally seen and found two plastic jugs of the sort found in the trunk by respondent's house. Those jugs contained "just the small dregs * * * of alcohol * * *, just enough that you could determine it was moonshine whiskey" (Tr. 41).

REASONS FOR GRANTING THE WRIT

The case presents three related issues, all of which have substantial significance for law enforcement. The first question is whether the application of the "plain view" doctrine is necessarily dependant on visual observation or whether it may be found upon other sensory perceptions. The second question is whether, after smelling the distinctive odor of moonshine whiskey, the further acts of peering into the truck and going into the truck to effect a seizure constituted the kind of additional intrusion into privacy interests for which a warrant is required. Finally, assuming that the subsequent visual observation and entry was a search of a kind for which a warrant would ordinarily be required, does the fact that the place searched was a movable vehicle justify a warrantless search? On this last issue the decision of the court of appeals is in conflict with the decision of this Court in *Chambers* v. *Maroney*, 399 U.S. 42, and in addition creates a conflict among the circuits. Review by this Court is therefore warranted.

1. In our view, the court of appeals misconceived the "plain view" doctrine and its application to this case, at once construing the doctrine too narrowly and too broadly. The court's construction was unjustifiably narrow in holding that Agent Williams' smelling of the moonshine did not amount to a "plain viewing" and that he "did not 'discover' the liquor until he actually saw it through the crack between the rear door of the truck" (App. A, *infra*, p. 7a). On the

other hand the court asked too much of the doctrine when it assumed that "[h]ad he 'discovered' the liquor at this point [the smelling], the plain view doctrine would be applicable to its seizure" (App. A, *infra*, p. 7a). For there would still remain the question (see point 2, *infra*) whether, having "discovered" the liquor in the truck bed, Williams was entitled to enter that area without a warrant and seize the whiskey. "Plain view" will not answer this latter question. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468.

There should be no constitutional priority among the senses; Agent Williams' smelling of the moonshine was as much a sensing of its presence, adequate for purposes of the plain view doctrine, as a visual observation would have been.

The court of appeals characterized Williams' olefactory perception as giving rise merely to probable cause (App. A, *infra*, p. 9a): "We have no doubt that, at the point at which Agent Williams smelled the distinctive odor of moonshine whiskey emanating from the truck, he had probable cause that the truck contained contraband." We agree, as the court of appeals observed (App. A, *infra*, p. 7a), that the senses might have been wrong—the whiskey might have been recently unloaded, leaving only its telltale odor.[2] By the same token, however, a visual observa-

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[2] However, even a drop or splash of non-taxpaid liquor would seem to be evidence of crime, which the agents would be entitled to seize. Moreover, the strength of the odor obviously turns on the quantity of whiskey present. Whether

tion may be mistaken: the clear liquid in the jugs might have turned out to be water. The frustration of the evidence of the senses is unlikely in either case, but it is possible in both. Confirmation (also by the senses) is needed in either case: the smell was confirmed by a sighting, just as a sighting is commonly confirmed by a smelling or tasting (as Williams did here (Tr. 41)). If anything, the sense of smell is more reliable than sight in identifying the presence of whiskey, for it is easy to imagine ways in which one might be mistaken in a sighting, but the smell by an experienced law enforcement officer was conclusive proof that there was some whiskey present, if only in a vapor state.

The court of appeals thus erred in holding that the smelling was not a "plain viewing" of the whiskey. If the "viewing" had led Williams to whiskey in an open field or if it had simply been in a paper bag on the ground, its warrantless seizure would unquestionably have been proper. *Hester* v. *United States*, 265 U.S. 57. Here, however, the whiskey was in the back of a truck, and the question becomes whether the further intrusion necessary to make the seizure could properly be undertaken without a warrant.

2. There are two independent justifications for the warrantless entry into the back of the truck. The search clearly falls within the "automobile exception"

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the odor was of such a strength as to indicate with reasonable certainty the presence of a measureable quantity (*i.e.*, whiskey in a liquid state, rather than vapors), would seem to be question of fact as to which the appellate court ought not substitute its own judgment.

to the warrant requirement (see point 3, *infra*), but we believe that the search and seizure would have been proper even if the storage place of whiskey had not been a movable vehicle.

If the truck had been immobile or wheelless, or if the whiskey had been stored in a bin, entry into those areas is not the kind of intrusion which calls for a prior determination of reasonableness by a neutral magistrate. As we discuss at greater length in our brief in *Cardwell* v. *Lewis*, No. 72-1603, whether a warrant should be required depends upon the nature and extent of the privacy interest invaded.* At one end of the spectrum, "[i]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable unless the police can show it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Collidge* v. *New Hampshire*, *supra*, 403 U.S. at 474. On the other hand, the otherwise reasonable search of an open field does not require a magistrate's prior determination of reasonableness. *Hester* v. *United States*, *supra*.

Here, the officers were lawfully on respondent's premises for the purpose of questioning him. Their search and seizure (once the whiskey had been smelled) did not involve entry into respondent's house or breaking into any enclosed space. Compare *Johnson* v. *United States*, 333 U.S. 10; *Taylor* v.

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*We are serving a copy of our brief in *Cardwell* upon respondent's counsel.

United States, 286 U.S. 1. Rather, Agent Williams simply looked through a crack in the truck's door and, after he saw the whiskey, opened the swinging door and seized the whiskey. In our view this is not the kind of major invasion of respondent's privacy that should require—in addition to a showing of reasonableness—the prior approval of a neutral and detached magistrate.[4]

3. Apart from these general considerations, the fact that the whiskey was stored on a movable truck created an exigent circumstance justifying a warrantless search. The court of appeals held that, since the officers could have guarded the truck while one of them went for a warrant, the warrantless search was unreasonable (App. A, *infra*, pp. 13a-14a). The holding not only misconstrues this Court's holding in *Coolidge*, *supra*, and neglects its holding in *Chambers* v. *Maroney*, *supra*, but also places the Fourth Circuit in conflict with the Ninth Circuit's ruling in *United States* v. *Connally*, 479 F. 2d 930, which the court of appeals in this case recognized "flatly holds that the inconvenience of posting a guard is an

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[4] Indeed, it is our position that the Agent's act of looking into the truck, even if labelled a search, would have been reasonable, and therefore lawful, on the basis of a well-founded suspicion falling short of probable cause. A similar question is presented by our petition for a writ of certiorari in *United States* v. *Hamilton*, No. 73-1726, a copy of which we are sending to respondent's counsel. If we are correct in that view, then surely the fact that the suspicion in this case rose to the level of probable cause could not operate to make the search unreasonable.

'exigent circumstance' that justifies dispensing with the warrant requirement" (App. A, *infra*, p. 13a).

While the truck here (like the car in *Coolidge*) was parked on private property, in all other significant respects this case is more like *Carroll* v. *United States*, 267 U.S. 132, upholding the warrantless search of an automobile, than like *Coolidge*. Thus, in *Coolidge* the Court distinguished *Carroll* in the following respects (403 U.S. at 460):

> In this case, the police had known for some time of the probable role of the Pontiac car in the crime. Coolidge was aware that he was a suspect in the Mason murder, but he had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly "fleeting." The objects that the police are assumed to have had probable cause to search for in the car were neither stolen nor contraband nor dangerous.

Here, in contrast to *Coolidge*, the agents did not know the truck contained whiskey until Agent Williams smelled it. Obviously the officers had neither probable cause nor opportunity to obtain a warrant prior to that time. Moreover, when the agents came upon the odor of moonshine, they knew respondent was hiding in the vicinity with every intention of "flee-

ing" and, unlike Coolidge, respondent had previously had no "opportunity to destroy any evidence he thought incriminating." Finally, unlike Coolidge's Pontiac, respondent's truck was in fact "being used for * * * [an] illegal purpose" and did contain "contraband."

The court also erred in holding that the agents were not entitled to search the truck because they could have posted a guard and secured a warrant. The posting of a guard would have been a "seizure" under the Fourth Amendment—an act that the agents were no more, or no less, entitled to do without a warrant than they were to "search" the vehicle or seize its contents. In *Chambers* v. *Maroney*, *supra*, 399 U.S. at 52, this Court recognized that, whenever a "seizure" without a warrant is justified, so is a search:

> For constitutional purposes, we see no difference between on the one hand seizing and holding the car before presenting the probable cause to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search either course is reasonable under the Fourth Amendment.

If, as the court of appeals appears to have believed (App. A, *infra*, p. 13a), it would have been reasonable to seize the vehicle and prevent respondent from removing it, then it was equally reasonable to search the truck immediately.

Finally, as we have noted (*supra*, p. 11), the holding below places the Fourth Circuit in conflict with

the Ninth Circuit, and this Court should resolve that conflict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General.

MAY 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-1803

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIAM GARLAND BRADSHAW, APPELLANT

Appeal from the United States District Court for the Western District of North Carolina, at Shelby. Woodrow W. Jones, District Judge.

Argued October 1, 1973 Decided January 9, 1974

Before BOREMAN, Senior Circuit Judge, WINTER and WIDENER, Circuit Judges.

WINTER, Circuit Judge:

Defendant appeals from his conviction upon a jury verdict that he possessed non-tax-paid whiskey in violation of 26 U.S.C. §§ 5205(a), 5604(a). The only question raised by this appeal is the admissibility, at defendant's trial, of certain jugs of moonshine whiskey, together with testimony concerning their

discovery, found in a truck parked on defendant's property near his residence by Agent Williams of the Alcohol, Tobacco and Firearms Division of the United States Treasury Department. On the basis of Agent Williams' testimony concerning events leading up to this warrantless discovery and seizure, the trial judge overruled defendant's objection to admissibility based on the fourth amendment. The government contends that the circumstances of Agent Williams' discovery and seizure fell within either or both of two recognized exceptions to the prohibition against warrantless searches—"seizure of evidence within plain view" or "automobile search." We disagree, and we reverse the judgment and grant a new trial, if the government be advised.

On November 16, 1972, at approximately 1:30 p.m., Agent Williams and a state enforcement officer were taken to the vicinity of defendant's residence by a second state enforcement officer who then drove off. Agent Williams and his companion nevertheless remained in radio contact with the other officer in the vehicle. Defendant had a reputation, known to Agent Williams, of being a moonshiner, and the purpose of the visit was to search the fields adjacent to defendant's property for a still. The only access to defendant's residence was an old road about a quarter mile in length that came to an end in his front yard. During their search of the adjacent fields, the officers observed three vehicles parked near defendant's residence, including the one from which the liquor was later seized. A fourth vehicle was seen by the

side of the access road, beyond the limits of defendant's property and apparently abandoned.

Upon approaching the fourth vehicle, the officers detected the aroma of moonshine whiskey emanating therefrom. When their search for a still proved futile, the officers decided to leave in order to prepare for a stake-out of the abandoned vehicle. Agent Williams summoned the officer in the vehicle by radio to pick them up at a certain spot. As they were walking to the pickup point, the defendant drove by them in his pickup truck proceeding in the direction of his house. The officers made an unsuccessful effort to conceal themselves. Agent Williams, who had known defendant for fifteen or sixteen years, was certain that defendant had recognized him. Defendant parked his vehicle near his residence and left, but the officers were unable to determine whether he entered the house or took to the nearby fields.

As a result of this encounter, the officers decided they could not leave the scene without a substantial risk that defendant, alerted to their presence, might remove any contraband or evidence that might be contained in the abandoned car. After the third officer arrived in his car, they decided to go up to defendant's house, summon him to the door and ask him what connection, if any, he had with the abandoned car as a preliminary to searching it. Agent Williams and the others then drove to defendant's residence.

Agent Williams' attempts to summon defendant to the front door were interrupted by the arrival of two

men in a truck carrying bran—a usual ingredient in the manufacture of moonshine whiskey. After a short discussion with the officers, the two men drove off and Agent Williams resumed knocking at the front door, calling defendant by name.

Failing to obtain a response, Agent Williams decided to try the back door. En route to the rear of the house, he passed a 1952 Ford truck parked near the building. It was approximately a ton and a half in size with sideboards and swinging doors in the rear which were closed. This meant that whatever may have been resting on the bed of the truck could not have been detected by the casual glance of a passer-by. When Williams got near this truck, he noticed that it exuded a strong odor of moonshine whiskey. Agent Williams' ability to identify the odor of moonshine whiskey is not in dispute.

Agent Williams then "stopped at the rear of the truck" and "looked through a kind of crack in the back swinging doors"—this crack was a space between the edges of the doors which did not fit together snugly when closed. Through this crack Agent Williams observed a large quantity of one gallon plastic jugs containing a white liquid. He then entered the truck, ascertained that the jugs contained moonshine liquor and seized them. He, of course, did not have a warrant for the search or the seizure.

II.

It is commonplace learning that warrantless searches and seizures are unreasonable within the meaning of the fourth amendment unless they fit within certain carefully defined classes of cases. Cady v. Dombrowsky, —— U.S. ——, 41 U.S.L.W. 4995, 4997-98 (U.S. June 21, 1973); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). And so we turn to the "plain view" exception to the prohibition against warrantless searches urged on us by the government.

The most recent exposition by the Supreme Court of the "plain view" exception can be found in the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971). There, two prerequisites to the availability of the exception were prescribed.

First, the officer's presence at the vantage point from which he discovers the evidence in plain view must not amount to an unjustifiable intrusion into an area with respect to which defendant's expectations of privacy are protected by the fourth amendment. That is, the officer must not have entered defendant's zone of privacy, or, if he has, such entry must have been justified by "a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused." 403 U.S. at 466. Secondly, the discovery of the evidence in plain view must have been inadvertent.

The rationale underlying this exception is that the abuses which the fourth amendment warrant requirement is designed to prevent are satisfactorily dealt with by the requirement that the original intrusion be constitutionally justifiable. In consequence, it would be needlessly inconvenient, and sometimes perhaps a danger to the police or to the evidence, to require the police to ignore evidence in plain view until they have obtained a warrant particularly describing it. 403 U.S. at 467-68.

Turning now to the application of these principles to the facts of the instant appeal, we conclude that the agents entered an area with respect to which the defendant had a reasonable expectation of privacy protected by the fourth amendment when they came onto his premises. However, the agents had a legitimate reason for this incursion unconnected with a search of such premises directed against the accused. They were clearly entitled to go onto defendant's premises in order to question him concerning the abandoned vehicle near his property.[1] Furthermore, we cannot say that Agent Williams exceeded the scope of his legitimate purpose for being

[1] Defendant's attorney, in the course of cross-examination of Agent Williams and Officer Devinney, advanced the contention that the actual purpose of the intrusion was a search of the truck in which the liquor was found. In admitting the evidence derived from the search, the district court impliedly found that the agents' purpose in going onto defendant's property was, in fact, what their testimony showed it to be, i.e. to interrogate defendant about the abandoned vehicle. We cannot say that this finding was clearly erroneous.

there by walking around to the back door when he was unable to get an answer at the front door.

It follows that Agent Williams got within smelling range of the truck in which the liquor was found without unjustifiably intruding into defendant's fourth amendment zone of privacy. Had he "discovered" the liquor at this point, the plain view doctrine would be applicable to its seizure. However, Agent Williams did not "discover" the liquor until he actually saw it through the crack between the rear door of the truck. The liquor was certainly not in "plain view," within the ordinary meaning of that phrase, when Agent Williams first detected the odor emanating from the truck. Nor did he, at that point, have any basis upon which to conclude, with certainty, that liquor was actually present in the truck. An alternative explanation of the smell was equally probable—that liquor had once been present in the truck but had since been removed leaving the truck permeated with its vapors. Agent Williams thus had no more than a reasonable ground to infer the presence of liquor at this point. A further visual observation was necessary to confirm the hypothesis.

It was not possible for Agent Williams to make this confirmatory observation without exceeding the original purpose of his intrusion, which had justified his presence on defendant's property up to that point, and making a further intrusion into an area of protected privacy. Objects lying on the bed of the truck could not be seen except by someone who took special pains to look through the crack. The truck was

parked on defendant's property very near to his residence. Under such circumstances, the defendant had a reasonable expectation that the contents of his truck would remain unknown to the general public.[2] Thus, we believe that when Agent Williams looked through the crack between the closed rear doors of the truck, he "searched" the truck within the meaning of the fourth amendment.

We hold that where, in the course of an initially justifiable intrusion, an officer discovers facts which give him reason to believe that evidence of crime will be found by a further intrusion beyond the scope of the original intrusion, the "plain view" doctrine is inapplicable unless there is independent justification for such further intrusion.[3] Since it was a search

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[2] *Compare*, Smith v. Slayton, 484 F.2d 1188 (4 Cir. 1973) (Evidence on front seat of auto parked on public street).

[3] Although we are also convinced that Agent Williams' ultimate discovery of the liquor was not "inadvertent" as required by the plurality opinion in *Coolidge*, the need for showing inadvertance, in addition to justifiable intrusion into defendant's expectations of privacy, is not beyond dispute. It is clear from the separate opinions in *Coolidge* that three members of the present Court (Burger, C.J., White, J., and Blackmun, J.) disagree with the requirement that the discovery be inadvertent. These, together with the two new members (Rehnquist, J. and Powell, J.) could make a majority against the "inadvertence" requirement. This circumstance has led to a split of authority in the lower courts over the continued viability of the "inadvertence" requirement. *Compare*, Martinez v. Turner, 461 F.2d 261, 264-65 (10 Cir. 1972) (applying the requirement) with North v. Superior Court, —— Cal.3d ——, 502 P.2d 1305, —— Cal. Rptr. —— (1972) (rejecting it).

[Footnote continued on page 9a]

directed against the defendant, we must examine whether the "automobile search" doctrine validates Agent Williams' further intrusion of looking through the crack between the doors of the truck.

III.

It is established that under certain circumstances, an officer, having probable cause to believe that an automobile contains evidence of the commission of a crime, may search that automobile for such evidence without first obtaining a warrant. Carroll v. U.S., 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970); Gomori v. U.S., 437 F.2d 312 (4 Cir. 1971). We have no doubt that, at the point at which Agent Williams smelled the distinctive odor of moonshine whiskey emanating from the truck, he had probable cause to believe that the truck contained contraband. Taken together with defendant's known reputation as a moonshiner and the presence at the scene, moments earlier, of two individuals in a vehicle carrying one of the raw materials of a distilling operation, Agent Williams' detection of the odor of moonshine amounted to probable cause for

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[3] [Continued]

In view of the uncertain status of the "inadvertence" requirement, we rest our decision on the ground that Agent Williams did not discover the evidence until his intrusion had exceeded the bounds of his original justification for being present. All the justices in *Coolidge* agreed that the original intrusion has to be justifiable if the plain view exception is to apply.

the belief that moonshine was to be found in the truck.

But here again, the lack of a clear majority in *Coolidge* makes difficult a decision as to the exact scope of the doctrine that a warrantless search of an automobile may be made upon probable cause. In Coolidge v. New Hampshire, supra, a plurality of the Supreme Court found the *Chambers/Carroll* doctrine inapplicable to a certain seizure of an automobile because

> . . . there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is impractical to secure a warrant." 403 U.S. at 462.

Elsewhere the plurality explained that the automobile exception was a specific instance of the doctrine of "exigent circumstances" justifying a warrantless search:

> As we said in Chambers . . . "exigent circumstances" justify the warrantless search of "an automobile *stopped on the highway*," where there is probable cause, because the car is "movable, the occupants are alerted, and the car's contents may never be found again if a warrant must

be obtained." "[T]he opportunity to search is fleeting . . ." 403 U.S. at 460 (emphasis supplied by the *Coolidge* plurality.)

If we could accept as fully authoritative the plurality opinion in *Coolidge*, reversal clearly would be required. Of the specific factors tending to justify a warrantless search of an automobile enumerated by the plurality, only two are present here—the object of the search was contraband and the guarding of the truck by two of the officers while the third went to obtain a warrant would have involved some inconvenience. But, absent entirely from this situation are any of the facts indicating risk of loss of evidence. We doubt that the plurality in *Coolidge* regarded the two factors present here alone as determinative. In the first place, the inconvenience of standing guard over a vehicle while another officer obtains a warrant is likely to be present in most automobile searches.[4] It is unlikely that the plurality thought that they were authorizing warrantless searches in such a large proportion of possible cases, particularly since it is clear that their conception of the rationale underlying the exception is based on the risk of loss of evidence. Secondly, we do not believe that the plurality intended to place determinative significance upon the distinction between "contraband" and "mere evidence" that had been cate-

[4] The only reason why this factor was not present in *Coolidge* was that the police decided to keep the vehicle under surveillance for a substantial period of time after they had obtained probable cause to seize it before taking any action.

gorically rejected in Warden v. Hayden, 387 U.S. 782 (1967).[5]

There is, however, substantial doubt concerning whether the *Coolidge* plurality's apparent view that the "automobile exception" is limited to circumstances where the obtaining of a warrant would risk loss of evidence is any longer a correct statement of the law. In applying *Coolidge*, courts other than the Supreme Court have sustained warrantless searches of automobiles under circumstances where the only factor that could possibly have militated against imposition of the warrant required is the inconvenience of posting a guard over the vehicle while someone is sent to obtain a warrant. People v. Bukoski, —— Mich. ——, 200 N.W.2d 373 (1972); People v. Dumas, 13 Cr.L.Rptr. 2515 (Sup. Ct. Calif. August 14, 1973); U.S. v. Bozado, 473 F.2d 389 (8 Cir. 1973); U.S. v. Connally, 479 F.2d 930 (9 Cir. 1973).[6]

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[5] *But, see*, U.S. v. Menke, 468 F.2d 20 (3 Cir. 1972) for the contrary view concerning the importance of the fact that contraband is the object of the automobile search.

[6] It could be argued that our own decision in Smith v. Slayton, supra, note 2, also falls into this category of cases. Judge Butzner in writing for the court, cited the exposure of evidence on the front seat of a car parked across the street from a police station as an exigent circumstance justifying immediate seizure. His opinion does not disclose whether more than one officer was present so that a guard could be posted while a warrant was obtained, although presumably other police were available from the police station across the street. But the principal basis of the decision was that the plan view doctrine applied, because the blood stained seat cover was clearly visible to one who had a right to be on a public parking lot.

The *Connally* case flatly holds that the inconvenience of posting a guard is an "exigent circumstance" that justifies dispensing with the warrant requirement. The *Dumas* case explains its result in terms of the less intense expectation of privacy that attaches to automobiles when compared with personal residences. Such reduced expectation of privacy justifies dispensing with the warrant requirement when there is probable cause.

Furthermore, the Supreme Court has recently stated that, in addition to the risk of loss of evidence, the extensive and often non-criminal contact with automobiles that *state* enforcement officials have in the course of the performance of their duties justifies treating automobiles differently from houses for purposes of the warrant requirement. Cady v. Dombrowski, —— U.S. at ——, 41 U.S.L.W. at 4997. Although this new element in the rationale for the "automobile exception" would not, on its face, appear to apply to searches for evidence of a federal crime conducted by federal officers, the decision in Cady v. Dombrowski suggests that the rationale for the exception is somewhat in a state of flux.

Prior to the dissents in *Coolidge* and the decision in *Cady*, the scope of the automobile exception seemed to be carefully defined to require the presence of circumstances indicating the risk of loss of evidence. Certainly, that is the only fair reading of the *Carroll-Chambers-Coolidge* line of cases. We are not persuaded that this line of cases has been abandoned or overruled. Therefore, we are constrained to conclude

that this search was invalid.[7] We are particularly persuaded where, as here, the vehicle is parked on defendant's property, a circumstance, we believe, which enhances the defendant's expectation of privacy with respect to its contents.

To summarize, we hold that, since two of the agents could have guarded the truck smelling of moonshine whiskey while the third obtained a warrant without significant risk of loss of evidence, the search and seizure in this case violated the fourth amendment and that the fruits thereof should have been suppressed.

For these reasons, we reverse the judgment of conviction against defendant. On the present record, there is lacking evidence legally sufficient to convict

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[7] We disclaim any intention of overruling United States v. Gills, 357 F.2d 299 (4th Cir. 1965), and we do not think, despite the dissents' contrary suggestion, that we achieve that effect *sub silentio*. The only issue decided in *Gills* was whether there was *probable cause* to search defendant's car which had been stopped on the highway. We held that there was probable cause to search when the odor of moonshine whiskey was detected, defendant employed deceptive means to prevent access to the trunk of the vehicle and defendant attempted to flee under extremely adverse conditions to avoid the search. We did *not* consider the separate issue of a warrantless search. Moreover, the search was conducted *after* defendant was arrested, and the vehicle searched was under his control at the outset of the encounter, so that, as a case decided prior to Chimel v. California, 395 U.S. 752 (1969), a warrantless search might have been sustainable as a search incident to a lawful arrest. Indeed, several of the authorities cited in *Gills* are "incidental search" cases. 357 F.2d at 302. If the continuing vitality of *Gills* has been impaired, the impairment stems from *Chimel*, and not from what is decided today.

defendant if the search, the seizure and testimony with respect to them are excluded. We do not know, however, whether the government has available other evidence of guilt not sought to be used at this trial. In reversing, we therefore grant the government the right to try defendant anew, if it be so advised.

Reversed: New Trial Granted.

WIDNER, Circuit Judge, dissenting:

I respectfully dissent and would affirm the conviction on the ground that the evidence was lawfully seized under the plain view exception, or as phrased in this circuit without mentioning plain view, "probable cause for the search complained of." *Gills*, infra, p. 303.

The majority finds that:

> (1) ". . . the agents had a legitimate reason for this incursion [of the curtilage] unconnected with a search of such premises directed against the accused." Slip op. p. 8.
>
> (2) "They were clearly entitled to go onto defendant's premises in order to question him concerning the abandoned vehicle near his property." Slip op. p. 8.
>
> (3) "Furthermore, we cannot say that Agent Williams excedeed the scope of his legitimate purpose for being there by walking around to

the back door when he was unable to get an answer at the front door." Slip op. p. 8, 9.

(4) "It follows that Agent Williams got within smelling range of the truck without unjustifiably intruding into defendant's Fourth Amendment zone of privacy." Slip Op. p. 9.

(5) "Agent Williams' attempts to summon defendant to the front door were interrupted by the arrival of two men in a truck carrying bran —a usual ingredient in the manufacture of moonshine whiskey." Slip op. p. 5.

As noted in the opinion of the court, moonshine whiskey has a distinctive odor, and, contrary to the majority, I am of opinion that the agent "discovered" (see slip op. p. 9) the moonshine when he smelled the odor coming from the truck and, looking through the crack in the door, saw it without disturbing the door of the vehicle. Under the "totality of facts and circumstances" existing here, *Gills*, p. 302, the ensuing search to me was not the unreasonable search prohibited by the Fourth Amendment.

We have upheld a search under facts no more favorable to the government in *United States* v. *Gills*, 357 F2d 299 (4th Cir. 1965), cert. den. 384 US 933 (1966), a case mentioned only by footnote by the majority, which I suggest the opinion of the court here overrules.

Although the majority opinion states the holding in *Gills* did "*not* consider the separate issue of a warrantless search," I find it difficult to grasp how the question arose on appeal, separately or other-

wise, "under the Fourth Amendment" as stated at p. 301, *Gills*, unless the objection in the trial court to the admissibility of the evidence was that the search had been made without a warrant. *Gills* precisely held that the search was justified because the totality of facts and circumstances created "probable cause for the search complained of," *Gills*, p. 303. The majority opinion, then, despite its holding, at slip. op., p. 12, that the agent ". . . had probable cause to believe that the truck contained contraband" and ". . . probable cause for the belief that moonshine was to be found in the truck," necessarily holds that something in addition to probable cause is required for the search of a motor vehicle without a warrant. In my opinion, this case ought to come within the rule expressed in *United States* v. *Haley*, 321 F2d 956, 958 (6th Cir. 1963):

> "If, on the other hand, the search occurred before the arrest, it came within the rule that a search without a warrant of an automobile engaged in the illegal transportation of intoxicating liquor, made upon probable cause, is not prohibited by the Fourth Amendment."

The *holding* of the majority is:

> ". . . we hold that, since two of the agents could have guarded the truck smelling of moonshine whiskey while the third obtained a warrant without significant risk of loss of evidence, the search and seizure in this case violated the Fourth Amendment and that the fruits thereof should have been suppressed." (Slip op. p. 19).

The majority, then, suggests that two of the agents should have stayed on the defendant's property, without a search warrant, and *guarded the truck*, obviously for the sole purpose of preventing the defendant from exercising dominion over it—a seizure in any context. In my opinion, this seizure of the whole truck, while awaiting the return of the third agent with the search warrant, would have been at least as unjustifiable as looking through the crack in the door, which has been disapproved. The Fourth Amendment protects against "unreasonable searches *and seizures*." Holding that the search by looking would be unlawful, when the *seizure* of the whole truck would not, is construing the Fourth Amendment with critical niceness to which I may not accede.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-1803

[Filed Jan. 9, 1974 William K. Slate, II, Clerk]

UNITED STATES OF AMERICA, APPELLEE

versus

WILLIAM GARLAND BRADSHAW, APPELLANT

Appeal from the United States District Court for the Western District of North Carolina.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed, and a new trial granted consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-1803

[Filed Apr. 1, 1974, William K. Slate, II, Clerk]

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIAM GARLAND BRADSHAW, APPELLANT

ORDER

William Garland Bradshaw's petition for rehearing, with the suggestion for rehearing in banc, has been read and considered. A poll on the suggestion for rehearing in banc was conducted, but the suggestion fails for want of majority support among the judges eligible to vote thereon. A majority of the panel has voted to deny rehearing.

It is, therefore, ORDERED that the petition for rehearing be, and it is hereby, denied.

For the Court:

(Signed) Harrison L. Winter
HARRISON L. WINTER,
United States Circuit
Judge

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